

**In the United States**  
**CIRCUIT COURT OF APPEALS**  
**for the Ninth Circuit**

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E. ROYCE, B. ROYCE and A. H. WENCK, doing  
business as Gray Line Tours,

*Appellants,*

vs.

CLARK SQUIRE, Collector of Internal Revenue  
for the District of Washington,

*Appellee.*

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**APPELLANTS' PETITION FOR REHEARING**

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Upon Appeal from the District Court of the United  
States for the Western District of Washington,  
Southern Division.

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To the United States Circuit Court of Appeals for the  
Ninth Circuit and the Honorable Judges thereof:

Comes now the appellants in the above entitled cause  
and hereby respectfully petition this Honorable Court  
for a rehearing of the above entitled cause. The grounds  
upon which the appellants rely are as follows:

## I.

This Court overlooked the distinction between the power granted under the Federal Declaratory Judgments Act, 28 U.S.C.A., Sec. 400, and the Court's power apart from any statute to decide a question which might guide a public agency in its future acts.

## II.

This Court in a material way misapprehended the appellants' argument and the significance of the cases cited by the appellants on pages 4 and 5 of the Supplemental Brief of appellants; namely, the argument and cases showing that the case at bar is not moot.

## III.

This Court erred in holding in effect that the Federal Declaratory Judgments Act, 28 U.S.C.A., Sec. 400, precludes the court from determining whether or not at the times mentioned in the complaint and pre-trial order the appellants were operating their seven passenger motor vehicles on an established line within the meaning of Sec. 3469 of the Internal Revenue Code (26 U.S.C.A., Sec. 3469).

## IV.

This Court erroneously concluded that it was without power to decide the question stated in ground III above.

**STATEMENT OF FACTS AND  
POINTS OF LAW  
UPON THE ABOVE GROUNDS**

Appellants respectfully show:

In its opinion filed May 18, 1948, this Honorable Court stated that it was not "at liberty to grant the declaratory relief it has been suggested we ought to give," and cited 28 U.S.C.A., Sec. 400, as excluding from the power to grant such relief controversies with respect to federal taxes. The relief sought and referred to is a decision by Honorable Court upon the question of whether or not at the times above mentioned appellants were operating their seven passenger motor vehicles on an established line within the meaning of 26 U.S.C.A., Sec. 3469.

The Declaratory Judgments Act, 48 Statutes at Large, Ch. 512, p. 955, (28 U.S.C.A., Sec. 400) was approved June 14, 1934, and amended August 30, 1935, so as to except controversies with respect to Federal taxes. Wholly apart from this statute the Federal Courts have the power to grant the relief sought by the appellants. The cases of *Boise City Irrigation and Land Company v. Clark*, 131 Fed. 415 (C.C.A. 9, 1904) and *So. Pac. Terminal Co. v. Int. Comm. Comm.*, 219 U.S. 498, 515 (1911), cited at pages 4 and 5 of appellants' Supplemental Brief herein, were decided many years prior to the enactment of the Declaratory Judgments Act. In the *Boise City* case this Court indicated and exercised its power to decide a question of law presented which

might serve to guide a public agency in the future. This power did not and does not rest upon a statute. This power would enable the Court to determine a question of fact as well as law where the determination comes within the reason and purpose for which the power exists. It is this power existing wholly independently of any statute that appellants respectfully requested and again request this Court to exercise in the case at bar.

*Walling v. Mutual Wholesale Food & Supply Co.*, 141 F. (2) 331 (C.C.A. 8, 1944), also cited at page 5 of the Supplemental Brief, was decided after the enactment of the Declaratory Judgments Act, but the power that the Court exercised in this case did not rest upon the Act nor upon any other statute.

The Declaratory Judgments Act is purely a grant of power. The Act was not designed nor intended to displace nor abrogate previously existing rules, powers and remedies. As the function of the amendment was merely to restrict the use of the newly granted power to controversies other than those with respect to Federal taxes, the amendment likewise did not displace powers of the Federal Courts which existed prior to and independent of the original Act.

The appellants did not institute a proceeding under the Declaratory Judgments Act, and they are not bound by its restrictions. They brought their action for a refund of money collected from them as taxes.

This Honorable Court has held appellants are not



entitled to a refund, but that holding does not make this a case instituted under 28 U.S.C.A. 400. The appellants relied and still rely on the power of the Court which exists wholly apart from any statute to decide the question above stated.

The holding that the appellants are not entitled to a refund does not make moot the question of whether or not plaintiffs were operating on an established line within the meaning of Sec. 3469, I.R.C. The whole matter simmers down to whether that question is moot in this case, and the authorities hereinbefore cited show that it is not. The Declaratory Judgments Act is not involved.

Decision on the question is necessary as a future guide to Bureau officials as well as to the appellants. This Court has the power to decide that question irrespective of 28 U.S.C.A., Sec. 400 as amended, but it gave no consideration to this power. It did not mention this power in its opinion, and, as stated, it was this power upon which appellants relied, and not upon the grant of power under 28 U.S.C.A. 400. If the Court should consider that the exercise of this power is discretionary, then appellants request the Court to exercise it in this case because an adjudication of this point at this time will resolve the instant dispute and obviate the need for, and expense of repetitious litigation in the future concerning the latter quarter of 1944 and following years. The record on the question of whether or not appellants were operating their vehicles on an established line is complete and it is before this Court.

In *Sharp & Dohme v. United States*, 144 F. (2) 456

(C.C.A. 3, 1944), cited in the opinion, there was no contention that the facts and circumstances required a ruling for future guidance. The nature of the transaction was not recurrent as it necessarily is in the instant case. The *Sharp & Dohme* case does not hold that this Court in a case such as the one at bar cannot properly pass upon a question such as we are requiring it to decide.

WHEREFORE, Upon the foregoing grounds, it is respectfully prayed that this petition for a rehearing be granted, that this Honorable Court exercise its power to determine and that it determine the question of whether or not at and during the times mentioned in plaintiffs' complaint and the pre-trial order the appellants were operating their vehicles on an established line within the meaning of 26 U.S.C.A., Sec. 3469, and that the decision of the District Court upon that question be reversed.

Respectfully submitted,

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RANDALL S. JONES,

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Portland 4, Oregon,

Attorneys for Appellants.

I hereby certify that in my judgment, as counsel herein, the foregoing petition is well founded in law and it is not interposed for the purposes of delay.

RANDALL S. JONES,

Of Counsel for Appellants-Petitioners.

## APPENDIX

As originally enacted the first paragraph of the Declaratory Judgments Act, 48 Statutes at Large, Ch. 512, p. 955 (28 U.S.C.A., Sec. 400) approved June 15, 1934, read as follows:

“In cases of actual controversy the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.”

Section 405, Ch. 829 of 49 Statutes at Large, p. 1027 approved August 30, 1935, amended the above paragraph of the Declaratory Judgments Act as follows:

“by adding after the words ‘actual controversy’ the following: ‘(except with respect to Federal taxes)’.”

26 U.S.C.A., Sec. 3469(a), imposing the transportation tax concludes with the following sentence:

“Such tax shall apply to transportation by motor vehicles having a passenger seating capacity of less than ten adult passengers, including the driver, only when such vehicle is operated on an established line.”